IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.147 OF 2004

Shri Ashok Ranganath Zope. Petitioner.

Vs.

Smt. Alka Ashok Zope. Respondent

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Shri N.C.Walimbe for the petitioner.

Shri D.B.Lonkar for the respondent.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 15th OCTOBER, 2004.

P.C.

1. Heard the learned advocates for the parties.

2. The petitioner challenges the order dated 1st April, 2004 passed by the lower appellate Court in Misc. Appeal No.68 of 2002 whereby the lower appellate court has allowed the appeal and set aside the order of the trial Court dismissing the application for setting aside the ex parte decree and has remanded the matter to the trial court for further proceedings.

3. It is the contention on behalf of the petitioner that, neither the respondent was absent on 23rd September, 1998 on which date the ex parte decree

was passed nor the respondent had disclosed any sufficient cause for setting aside the ex parte decree, and therefore, the lower appellate Court erred in interfering with the order passed by the trial Court dismissing the application filed by the respondent for setting aside the ex parte decree.

4. The lower appellate Court in the impugned order, while considering the facts of the case, has clearly arrived at the finding that the order passed by the trial Court is contrary to the evidence on record, and did not disclose the discretion having been exercised judiciously by the trial Court. Though the lower appellate Court has not specifically stated in so many words that the trial Court had failed to exercise its discretion judiciously, the overall appreciation of the materials placed on record and the findings arrived at by the lower appellate court disclose the same.

5. Undisputedly, the order of the trial Court, on assessment of the materials placed on record before it, discloses that the respondent had produced sufficient materials in support of her contention about the sickness and admission of her mother in the hospital, and on that count there was a necessity of

the respondent's presence with her mother. Merely because the respondent has a brother to attend to his father and her mother, that could not be a justification to refuse the the explanation submitted by the respondent regarding the necessity of her presence with her mother when her mother was sick and was required to arrange the necessary treatment and for that reason, the respondent was required to go to Mumbai.

6. Secondly, the records apparently disclose that the lower appellate Court has exercised its discretion judiciously. It was the contention of the respondent in paragraph 8 of the application for setting aside the ex parte decree that in fact in September, 1998 and the day on which the suit was decreed ex parte, the respondent had attended the Court and on having so attended, she had learnt about the ex parte order passed in the matter. The trial Court has nowhere referred to the said statement of the respondent in her application while rejecting her application, nor has held that the said statement to be patently false. If the contention of the respondent that she had attended the Court on 23rd September, 1998 is to be accepted, and the impugned order is sought to be challenged on that ground itself, it is apparent that

the trial Court had acted illegally in decreeing the suit ex parte on 23rd September, 1998. Once it was apparent that the defendant had attended the Court on the relevant day, there was no occasion for the Court to decree the suit ex parte. In case the defendant had caused any obstruction to the proceedings or had failed to produce evidence inspite of the opportunity having been given to her, certainly the trial court could have proceeded with the suit by ordering closure of her evidence. However, by no stretch of imagination, the trial Court could have proceeded to decree the suit ex parte when the respondent had attended the Court on 23rd September, 1998.

7. For the reasons stated above, therefore, there is absolutely no case for interference in the impugned order in revisional jurisdiction. The impugned order also does not disclose any jurisdictional error having been committed by the lower appellate Court while setting aside the ex parte decree passed by the trial Court against the respondent in a petition for divorce.

8. In the result, therefore, there is no case for interference in the impugned order in exercise of revisional jurisdiction. The civil revision

application is rejected. No order as to costs.

9. Certified copy be expedited.